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RETHINKING INSURANCE DISPUTES

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Aller au sommaire du numéro

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Résumé de l'article

Cet article analyse en profondeur les principaux modes de résolution des conflits liés à l'assurance, à savoir la négociation, la médiation et l'arbitrage, sachant que les intervenants de cette industrie sont vraiment conscients de l'importance majeure qu'on doit accorder à ces modes susceptibles de résoudre les conflits en matière d'assurance. L'auteur ne manque pas de mettre en lumière les aspects liés à la confidentialité, aux communications privilégiées et à la déontologie, qui permettent de rehausser l'efficacité et la performance de ces modes alternatifs. Cette analyse peut servir autant d'instrument fondamental à l'usage des praticiens de l'industrie de l'assurance qu'aux réflexions futures dans ce domaine.

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by Ani M. Abdalyan

Either at the commencement or in the course of the game, the players may mutually agree upon any deviation from the laws they think proper. Code of Chess Laws, 1860 revision.

ABSTRACT

All stakeholders in the insurance industry appreciate the critical importance of alternate dispute resolution ("ADR") to the resolution of insurance disputes. What follows is a practical and in-depth analysis of negotiation, mediation, and arbitration as these dispute resolution methods relate to insurance. The author weaves in confidentiality, privilege, and ethics with a view to enhancing the effectiveness and efficiency of ADR in insurance disputes. This analysis serves as a foundation tool for ADR practitioners in the insurance industry and for future thoughts to follow.

Keywords: Insurance disputes, confidentiality, privilege, ethics, alternate dispute resolution.

RÉSUMÉ

Cet article analyse en profondeur les principaux modes de résolution des conflits liés à l'assurance, à savoir la négociation, la médiation et l'arbitrage, sachant que les intervenants de cette industrie sont vraiment conscients de l'importance majeure qu'on doit accorder à ces modes susceptibles de résoudre les conflits en matière d'assurance. L'auteur ne manque pas de mettre en lumière les aspects liés à la confidentialité, aux communications privilégiées et à la déontologie, qui permettent de rehausser l'efficacité et la performance de

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Mots-clés : *conflits liés à l'assurance, confidentialité, déontologie, communications privilégiées, mode de résolution des conflits.*

INTRODUCTION

Complexity is inherent in insurance disputes in the sense that each dispute has many distinctive parts while, at the same time, is a very integrated system enabling numerous parts to work together. Insurance companies, jointly with manufacturers of faulty or injury-producing goods, are increasingly embracing the mediation or arbitration paradigm, in simple or complex insurance disputes, even if alternate dispute resolution is not provided for in a contract[1]. Allowing insurance companies to use alternate dispute resolution ("ADR") to resolve disputes does raise concerns regarding private law and private justice although the appropriateness of ADR is generally accepted so long as the insurance consumer is informed at the commencement of the relationship and there is no fraud or coercion.[2] The thesis of this article is that the inclusion of "systems thinking"[3] by way of alternate dispute resolution as contrasted with the procedural and evidentiary boundaries of litigation can help to construct, deconstruct and reconstruct the evolution of complex insurance disputes.

To do so, this article will explore the spectrum of collaborative, consensual procedures of agreement[4] for insurance disputes including negotiation and models of mediation and, evaluative procedures of decision[5] such as final/binding arbitration. This article will also explore key legal issues that surround the spectrum of consensual or conciliatory dispute resolution options. By fully addressing the tendencies of which parties to an insurance dispute are capable, it is hoped to come up with novel solutions to insurance problems, to reduce transaction costs, diminish legal uncertainties and adopt an increasingly sophisticated approach to insurance dispute resolution.

■ CHANGING MARKETPLACE PERCEPTIONS AND TRENDS

☐ Industry and Regulation

Adjudicative litigation in recent times is increasingly coming under closer scrutiny by the insurance industry and the judiciary, alike. At its recent annual shareholders meeting, Edward M. Liddy, the chief executive of Allstate referred to lawsuits as "a plague on corporate America."[6] In the UK, the Master of the Rolls, Lord Phillips of Worth Matravers, recently described the legal system as a "Rolls-Royce system", highlighted the importance of the proportionality of the cost of litigation to the size of the case and urged people to use "expensive lawyers" only as a last resort.[7] Indeed, Lord Phillips highlighted that "high fees are driving up insurance premiums as it was insurance companies that were footing the legal bills".[8]

The regulatory framework governing the legal profession in Ontario has aligned itself with alternate dispute resolution and the role of the lawyer in mediation.[9] In May 1996, the Law Society of Upper Canada revised Rule 10 of the Rules of Professional Conduct, The Lawyer as Advocate, by adding Commentary 6A to specifically deal with Alternative Dispute Resolution. It provides that:

> *The lawyer should consider the appropriateness of ADR to the resolution of issues in every case and, if appropriate, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options.*

The Rules of Professional Conduct also contemplate lawyers acting as mediators. Rule 25 governs mediation services of lawyers. It provides as follows:

> *The lawyer who functions as a mediator must ensure that the parties to the mediation process understand fully the function being discharged is not part of the traditional practice of law and that the lawyer is not acting as a lawyer for either party. The lawyer as mediator acts to assist the parties to resolve the matters in issue.*

Annexation of mediation to court-systems, the state legal system, is underway. Ontario has implemented the Mandatory Mediation Program under Rule 24.1 of the Rules of Civil Procedure[10]. It requires parties to defended civil, non-family actions in the Superior Court of Justice to attend mandatory mediation within ninety days of the filing of the statement of defence.[11]

In the insurance context, court-annexed programs as well as provincial insurance tribunals such as the Financial Services Commission of Ontario for motor vehicle accident benefits are examples of mandatory mediation.

The image of a fishing net has also been used to reinforce evolving perspectives regarding disputants and dispute resolution:[12]

> *Each person is like one of the knots in a large fishing net with its intricate interlacing of innumerable knots. Each person is tied to many others. When all of the knots are firmly tied, the net is in good and working condition. If any one of the knots is too loose or too tight, the whole net is skewed. Each knot, each relationship, has an effect on the whole. If there is a tear, a gap, in the net, the net is not a working one.... Nets are to be checked frequently, knots cared for tenderly, and if tears do appear they must be repaired.*

In the insurance context, the fishing net analogy can be reflected in the traditional economic concepts relating to the spread of risk and indemnification.

☐ ADR and Insurance

The principles of ADR are not new to insurance disputes. For many decades, provincial legislation governing insurance contracts has provided that if an insurance company and an insured fail to reach agreement upon the amount of loss or the value of an insured property, an appraiser must be appointed by each party, and the two appraisers must appoint an umpire to resolve the differences between them.[13] Disputes about a valuation of loss under a fire insurance policy must be determined by appraisal.[14]

Insurance litigation can extend to numerous areas including disputes regarding product liability, disputes as to quantum of damages in property policies, and disputes regarding professional malpractice. Disputes with a policyholder regarding coverage or disputes where the insurer is subrogated to the insured's right of recovery against others are examples of cases where one or more insurers are direct parties to a dispute.

Of critical importance to insurance litigation is the determination of the appropriateness of the ADR process followed by a decision as to which dispute resolution mechanism to use. Where there are matters of law or there is a wish to have precedent or where

there are allegations of fraud, ADR may not be appropriate.[15] Not all cases lend themselves to creative solutions and other situations where the use of ADR may be difficult or premature include situations where the parties are unwilling to settle or where the quantum of damages are not quantifiable. The predominance of facts in issue or mixed questions of fact, and law generally, lend themselves well to mediation.[16] The appropriateness of ADR to insurance also ties in with party objectives about which more is said below.

■ NEGOTIATION

Negotiation is the most common method of dispute resolution used in the insurance industry. Negotiation has been defined to mean any form of direct or indirect communication which enables parties with opposing interests to discuss any joint action they may wish to take so as to bring about the resolution of their dispute.[17]

Parties to a dispute may have a preference for a negotiation strategy. Negotiation research has revealed that, subject to ethical considerations, where a disputing party knows that the other has chosen to compete or to cooperate, competitive strategy will yield more advantage than cooperation.[18] In contrast, a party who is uncertain about the other's strategy may be more tempted to bring about a co-operative state to the negotiations.[19] Effective negotiations oftentimes combine the competitive and co-operative strategies to negotiation to create a hybrid.

□ Rights-based and Power-based Negotiations

The competitive (win-lose) strategy to negotiation is one of the key models of negotiation. This model is often used where it is assumed that the future relationship with the other party is unimportant but the specific outcome is regarded as being important.[20] In what is regarded to be a short-term thinking strategy, the competitive negotiator sees outcomes i.e. resources, gains, profits, to be limited and finite and attempts to obtain as much of the "pie" as possible.

The competitive strategy is compared with the strategies used in chess and other tactical battles and includes "researching, pressuring, and psyching out"[21] the other party. It is based on the strengths and weaknesses of a position. In planning for upcoming negotiations, the competitive positional model makes use of evalua-

tive tools, and attempts to persuade the other party that "it is up to them to make big moves in their position".[22]

Insurance disputes generally arise where a claim has been denied. Evaluative frameworks which include legal opinions on applicable legislation, policies, and judicial decisions and other rights-based information can be used to buttress particular positions and enhance competitive strategies to settle insurance disputes.

☐ Interest-based Negotiations

The collaborative (win-win) strategy is the second model of negotiation commonly used in the insurance industry. This interest-based or principled model of negotiation is used when the disputing parties recognize that they are interdependent and wish to "establish long-term goals for particular outcomes and for the relationship". Interest-based negotiation can also be referred to as "problem-solving negotiation".[24] Exploring, understanding and stressing the other party's goals and underlying needs so as to be able to work with the other party to realize their goals as well as one's own goals is critical to the collaborative problem-solving strategy.

In contrast to competitive strategies where time can be used to achieve one's own goals, collaborative parties respect time frames.[25] In addition to objective standards such as deadlines, the collaborating strategy relies on legal precedent and expert analysis to assist in negotiations and narrow options.[26]

The collaborative strategy, largely driven by the principled negotiation model, also known as expansive "getting to yes", encompasses four criteria, which are as follows: (i) separate the people from the problem, (ii) focus on interests, (iii) generate multiple and creative options and (iv) use objective criteria.[27]

Interests can be categorized as follows: (i) personal, (ii) professional, (iii) organizational, (iv) economic, and (v) legal.[28] In the insurance context, examples of interests, respectively, include the following: (i) an adjuster may have a personal interest in contributing to the fair and reasonable management of the insurance company's assets, (ii) a defence lawyer may have a professional interest in showing his competence and sophistication, (iii) an organizational interest may be the need to have consistency in payouts as tied in with specific circumstances, (iv) economic interests include legal fees, opportunity cost in the time spent pursuing the dispute, and the unpredictability of monetary damages granted by the courts, (v) legal interests can include precedents and risk assess-

ment of one's legal positions.[29] The use of objective criteria in the insurance context can include legislation, case law, policies, and risk assessments.[30]

☐ Legal and Ethical Considerations

In many negotiations, information is often the most critical resource.[31] Disputing parties may withhold information or may use tactics in the dissemination of information. Generally speaking, no legal prohibition *per se* exists prohibiting the use of deception and posturing in negotiation. Fraudulent statements, misrepresentation, and the law of contracts create, however, legal minefields as to negotiation boundaries.[32]

Insurance law, however, constrains what can be done in negotiations relating to insurance disputes. The duty of utmost good faith is a distinguishing principle of insurance law and both, the insured and the insurer, has a legal obligation to negotiate with each other in utmost good faith. The duty continues throughout the duration of the insurance policy and the insurer has a duty of good faith, somewhat akin to a fiduciary duty, regarding claims.[33] *In Bullock v. Trafalgar Insurance Co. of Canada*,[34] the court awarded aggravated damages against the insurer where the insurer denied a claim based on allegations of arson although it was not able to produce evidence of it. In *Dillon v. Guardian Insurance Co.*,[35] Justice Fitzpatrick held that there is a want of good faith where an insurer does not use reasonable care in settling a claim against its insured.

Unlike legal constraints, however, there is no code of ethics for negotiators. What information is shared, how it is shared, when it is shared are major factors in ethical behavior in negotiation.[36] A researcher in negotiator has commented as follows:[37]

> *...to sustain the bargaining relationship, each party must select a middle course between the extremes of complete openness toward, and deception of, the other. Each must be able to convince the other of his integrity, while not at the same time endangering his bargaining situation.*

Numerous characteristics may guide decisions about ethical behavior, including group, organizational, and industry norms.[38] In the insurance context, employee adjusters have a certain responsibility to their organization. There may be certain expectations on employee adjusters by the organization either through formal rules and regulations e.g. Code of Ethics of Ontario Adjuster's Association, or through verbal, informal expectations. In this context,

an insurance company's reputation as well as the reputation of the insurance industry generally will be determinative of the ethical norms.

Insurance companies have traditionally had Codes of Conduct and have tended to police themselves. In more recent years, insurers are increasingly embracing Codes of Ethics. While it is clear that negotiations tend to improve when the disputing parties agree as to definitions of ethical/unethical behavior, establishing such standards however is a huge task given the varying perspectives and views of people as to ethics. The reciprocity norm, which has been called the 'cement of society', requires a party to match the conduct of the other party.[39]

MEDIATION

Mediation refers to an informal process where a neutral or impartial[40] third party with no power to impose a resolution helps two or more disputing parties, through persuasive negotiation strategies, to voluntarily settle the dispute in a mutually acceptable manner.[41] As a general rule, mediation can be seen as the next logical step when negotiations have failed to bring about resolution. Mediation is assisted negotiation and the mediator's role includes structuring a process for communication among the parties, identifying issues, sharing information to analyze problems and exploring options for settlement. In contrast to adjudicative litigation, a key component of mediation is heightened client participation.[42]

Mediation aims to bring about "integrative solutions"[43] to the problems of the disputing parties, in the sense of protecting the key interests of the parties, squaring with applicable law or organizational policy, and exceeding each party's Best Alternative to a Negotiated Agreement ("BATNA").[44] At the end of the mediation, the disputing parties may either agree on one or more problems or there may be impasse. Although a mediation may be initiated on one or more specific issues, it is not uncommon for other issues to surface during the process. Even if mediation results in agreement on one or more problems, it may be that other issues remain to be solved in the courts.

There are numerous models of mediation discussed in the mediation literature. In the insurance litigation context, evaluative, rights-based mediation and facilitative, interest-based or problem-solving mediation are used most commonly to resolve disputes. In

practical terms, a large number of mediations in the insurance context are a mix of the two models and it may be advantageous to use evaluative, rights-based mediation where there are complex legal issues.

☐ Evaluative Mediation

In evaluative mediation, the focus is on "external data".[45] The mediator evaluates the relative strengths and weaknesses of the applicable procedural or substantive legal rules to the dispute, as well as the legal rights of the disputing parties. In this model, a mediator's evaluation may consist of opinions about elements of a party's case, opinions about the strengths and weaknesses of the entire case of a party, or opinions about how a court would likely decide.[46] It has been said that "the mediation takes place in the shadow of the law and the court and is designed to reproduce what a court would do."[47]

In terms of process, once the mediator puts forward the evaluation, the disputing parties may have a greater willingness to adopt the mediator's perspective. The rights-centered mediation is closest to a pre-trial hearing, and has also been referred to by many as a process of early neutral evaluation, an advisory form of ADR, which differs from mediation but shares many characteristics.

☐ Facilitative Mediation

In facilitative, interest-based mediation, the focal point is on "internal data",[48] i.e. the underlying interests of the parties, including their motives, wants, and desires. Underlying interests are a driving force in disputes. In the insurance context, the list of interests includes the following: to save time, to avoid time and money related to litigation, to save face, to establish precedent, to honor values related to justice and fairness, and to protect and preserve reputation.[49]

The opportunity provided by a facilitative mediation is the agreement of the parties as to the mutual satisfaction of their interests. The interest-based mediator generally does not opine on the merits of the case or about the positions of the parties. In this model, the mediator assists the parties in the sharing of information, communication of needs, interests and concerns, and active interaction to search for party-generated creative solutions to advance their respective interests. Problem-solving approaches such as inventing options outside a legal framework and "brainstorming" may be included to maximize resolutions.

☐ Party Objectives

Mediation models can be depicted by focusing on party objectives. Bush and Folger, in *The Promise of Mediation*, articulate social justice, satisfaction, oppression, and transformation as the diverse and pluralistic aspects of the mediation movement.

The social justice aspect of mediation facilitates the organizing of insureds and claimants so as to enable the reframing of issues and focussing on common interests.[50] In the insurance context, disputes which are resolved by mediation can enhance insureds' confidence to address their complaints by way of insured self-help and increased power of the insurance consumer. Seen from this perspective, the objective of mediation is to achieve social justice by enabling relatively powerless persons e.g. insureds, generally seen as the "weaker" party in an insurance dispute, to use self-help and gain access insurance company leaders so as to solve problems. The expectation of insureds of their entitlement to participate in decisions that govern their claims[51] thus becomes a reality.

In the context of personal injury claims, however, there appear to be two opposing perspectives. While mediation appears to be a suitable process in the sense that it addresses the *personal* aspect of the personal injury claim, there may, in fact, be special problems in the sense that expert advice, including competent legal advice, is required by the claimant in all phases of negotiations.[52] On the other hand, the relatives of the injured claimant, including spouses, children, and parents whose lives and relationships are affected, have the advantage of directly participating in the mediation and the settlement agreement.

Satisfaction of the needs of parties to a dispute is the most commonly cited party objective in mediation. The "flexibility, informality, and consensuality", as well as lack of limitation by legal categories and rules, allows the parties to reframe the dispute as a mutual problem and to solve the problem in a collaborative and integrative fashion.[53] In situations where mediation is used, private "economic and psychic" savings to disputing parties as well as public savings by preventing delays in access to justice can be achieved.[54]

It has been shown that where there is an opportunity to build a creative business solution to address underlying business interests and concerns mediation has been useful in insurance disputes.[55] Especially in liability insurance disputes, the opportunity of the insurer i.e. non-disputant with a stake in the outcome of the dis-

pute, to participate in mediation, either directly or by being kept informed, will be of central importance.[56]

This involvement of the liability insurer e.g. attending a caucus with the mediator, attending a meeting involving all parties to review a potential agreement[57] will facilitate the inclusion of all the parties or entities with an interest such that the possibility of later derailment of a mediated settlement is reduced. The benefits of the involvement in mediation by the liability insurer include minimizing claims handling costs, early settlement, closing claims files at amounts justifiable to shareholders and directors and assessing the credibility of the plaintiff claimant before trial.[58] In other words, the involvement of the liability insurer in mediation will assist in positional negotiation.[59] Seen from the perspective of the claimant plaintiff, however, the involvement of the liability insurer in mediation to assist the shift to positional negotiation may, depending on the particular facts of the specific case, leave certain problems or interests of the plaintiff claimant unmet.

Transformation of the disputing parties as well as society as a whole is the third aspect of mediation. In the context of insurance disputes, there may be a perception of imbalance in power as a result of the relative sophistication, access to information or financial resources of an insurance company. This power imbalance may not exist with corporate claimants who may be on par with the insurer. The empowerment dimension of the mediation process driven by the informality and consensuality allows disputing parties, especially where power imbalances may exist, to develop a greater degree of self-respect, self-reliance, and self-confidence, thus enabling the insurance consumer (non-personal injury claims) to have a greater degree of self-assuredness.[60] The recognition dimension of the mediation process allows disputing parties "a non-threatening opportunity to explain and humanize themselves to one another."[61]

The oppression aspect of mediation can, on the other hand, be as a result of the informality and consensuality of mediation as well as the absence of procedural and substantive safeguards, resulting in unjust outcomes. Although well intentioned, "because of its privacy and informality, mediation gives mediators broad strategic power to control the discussion, giving free rein to mediators' biases".[62] This, in turn, can influence outcome including issue framing and selection as well as the ranking of settlement options, disproportionately and unjustifiably favoring stronger parties e.g. the insurer and disadvantaging the insured, or the "weaker" party.

While it does create a settlement momentum, the entering into mediation, however, does not foreclose other options. As a result, the risks of oppression to a disputing party will be minimized especially if there are numerous parties with dissimilar interests.

☐ Co-mediation

The complexity of issues in insurance disputes, e.g. where there are multiple parties, multiple overlapping policies or multiple levels of conflict can overwhelm a mediator, especially where the mediator lacks substantive knowledge.[63] The disputing parties may discuss more than one issue at a time making it difficult for a single mediator to unbundle facts, define issues, and create options for mutual gain. While it may be a more costly process and potentially lead to novel ethical issues,[64] co-mediation by a mediator who has substantive expertise and a mediator who has process expertise could enhance the resolution of highly complex insurance disputes. A co-mediation team alleviates pressure and allows each mediator to take control of a set of issues and assimilate data while, at the same time, creating opportunities for exchanging information and discussion.[65]

Generally speaking, once the parties agree to start mediation[66] and the mediator(s) have been selected, it is prudent to enter into a mediation agreement setting out mutually agreeable terms of reference.

☐ Confidentiality

The expectation of privacy and the protection of confidentiality are critical components in the mediation process so as to ensure the disclosure of all relevant information by the disputing parties. Confidentiality in mediation is tied in with process as well as with the process leader. The parties must keep all communications and disclosure made during the mediation in confidence and not share or use information including sensitive information, and secondly the mediator may not disclose secrets or information revealed in mediation so as to maintain non-partisan fairness. In the context of systems thinking, confidentiality highlights the interdependence of the disputing parties and the mediator.

It is generally agreed, that "mediation is an extension of without prejudice settlement negotiations".[67] In other words, it is intended that mediations, as part of settlement discussions, not be later used in another forum or proceeding. As a result, the mediation agreement generally contains a provision that: "Statements made by any person, document produced, and any other forms of

communication in the mediation are off the record and shall not be subject to disclosure through discovery or any other process, nor are they admissible into evidence in any context for any purpose, including impeaching credibility."[68] Settlement memoranda, documents, and other correspondence between the parties are generally marked "privileged" and "without prejudice" to minimize the risk that the courts will compel disclosure of documentation arising in a mediation. Generally speaking, without prejudice, negotiations or statements, made in mediation, are considered confidential leading to a binding contract.[69]

It has been long-held wisdom that "confidential characteristics of the mediator's relationship with the parties are critical to useful performance. To violate a real confidence would destroy the mediator's effectiveness."[70] Generally, a mediation agreement will also contain a provision that the mediator is non-compellable as a witness in a court to disclose testimony and notes of the mediator from a private mediation are not disclosed. The non-compellability of the mediator may be articulated as follows:[71] "No party will, either during or after the mediation, call the mediator as a witness for any purpose whatsoever. No party will seek access to any documents prepared for or delivered to the mediator in connection with the mediation, including any records or notes of the mediator."

In North America, the commonly held wisdom is that the without prejudice and confidential aspect of mediation would be upheld by the courts despite the lack of specific legislation, even if the parties have not signed an agreement prior to mediation. In the absence of mediator's privilege as a matter of statute in Canadian law, judges can exercise discretion as to whether to compel a mediator to testify. In the absence of guiding legislation regarding the mediator's privilege, courts would likely draw upon the four-pronged inquiry set out by Wigmore S. to determine whether evidentiary privilege applies. Wigmore has set out the test as follows:[72]

> *a) the communication must have been imparted in confidence that it would not be disclosed to others;*
>
> *b) the preservation of secrecy must be essential to the success of the relationship;*
>
> *c) the relationship must be one that society wishes to foster and protect;*
>
> *d) any injury to the relationship caused by disclosure must outweigh the expected benefit to be derived from compelling disclosure.*

Exceptions to confidentiality do exist and at times at the outset of the mediation, the mediator indicates that the mediation will be an "open" process and that the mediator will be a compellable witness in later court proceedings.[73] Circumstances may also arise where maintaining confidentiality may breach the personal ethics of the mediator or it may be against the public interest.[74] In the insurance context, exceptions to confidentiality may relate to the sharing of information with the professional adviser of a party, for research or education, pursuant to court order or consent of the parties, or where the information reveals threat to life or safety.[75]

☐ Authority to Settle

The parties or party representatives attending the mediation may or may not have authority to settle. Practically, however, the absence at mediation of the person responsible for settlement for one of the parties can be perceived negatively as an imbalance in power or lack of good faith. As a result, it is desirable and prudent for the parties and/or the party representatives attending the mediation to have authority to settle.

In the insurance context, it is important for the parties or party representatives at the mediation to have authority to settle if the mediation process is to be relevant.

In *Magalhaes v. Lusitania Portuguese Recreation Club*,[77] Master Beaudoin held that the mediation was not properly held where counsel for the defendant insurer attended the mediation, but the insurer's representative, with authority to settle was available only by telephone. As a result, the plaintiff's abandonment of mediation was held to be not unreasonable.

While it is advisable to have full settlement authority present at a mediation, there exist different types of authority which may have a bearing on the dispute. The types of authority are as follows:[78] legal authority, advisory authority, conditional authority, and *de facto* authority.

Legal authority considerations relate to competence and capacity of all parties to be involved in the mediation. In the case of bodies corporate, the disputing parties may wish to confirm the authority of the representative e.g. by requesting a certified copy of a directors' resolution authorizing the individual to settle a dispute.

Advisory authority considerations relate to ability to verify data, tax, accounting, and legal assumptions e.g. from a doctor, lawyer or other professional as the case may be. Conditional authority considerations relate to approval of third parties who are not parties to the dispute. In the insurance context, third parties include reinsurers. *De facto* authority considerations relate to persons, while not directly involved in the dispute, who can exercise an informal type of control that can influence the mediation process, if they are not tied in to the mediation, either by attendance or by consultation.

In the insurance context, a provision regarding authority to settle can be inserted in the mediation agreement, as follows:[79] "The parties will send to the mediation representatives with full, unqualified authority to settle, and they understand that the mediation may result in a settlement agreement which contains binding legal obligations enforceable in a court of law."

■ ARBITRATION

While mediation is one of the favorites in the ADR movement, arbitration has been referred to as the "Cinderella of ADR".[80] Generally, and in the insurance context specifically, however, arbitration is increasingly becoming institutionalized.[81] Many insurance policies mandate arbitration e.g. where in the context of motor vehicle insurance disputes mediation has failed. Arbitration may also be set out in the insurance policy as the agreed upon dispute resolution mechanism in lieu of litigation e.g. in the context of reinsurance disputes.

Arbitration refers to an adversarial dispute resolution process and is not unlike litigation. A neutral third party acceptable to the disputants renders a decision on the merits of the case, after a relatively informal hearing where the parties present supporting legal oral argument and evidence.[82] The arbitrator is charged with the conduct and procedure of the hearing.

Generally, the onus of proof in an arbitration is on a balance of probabilities. At the end of the arbitration, the arbitrator renders a decision, binding or non-binding based on evidence, relevant law and legal principles. The arbitrator's award is often set out in a written decision at the end of the arbitration hearing, containing a statement of the issues, the mandate and authority of the

arbitrator, a summary of statement of facts and evidence, an analysis of the relevant legal principles and a statement of the decision.

☐ Natural Justice

Arbitration is governed by the rules of natural justice with overriding principles of fairness and jurisdiction. Arbitration is subject to judicial review if there is an error in law or the arbitrator exceeds his or her jurisdiction. The arbitrator must be a disinterested party. The arbitrator must be independent, have no pre-existing relationship with the disputing parties, have no prejudice or preference with regard to parties or outcome; there must be an absence of bias and there must exist no conflict of interest.[83] Arbitration also entails a bundle of procedural rights including right to notice of hearings, right to present one's case, each party knowing the case he has to meet, the right to disclosure and having the opportunity to challenge the other party's position.

☐ Key Characteristics

Arbitration has been said to have three key characteristics.[84] Firstly, arbitration can be mandated by statute e.g. by the Financial Services Commission of Ontario for automobile insurance disputes, or voluntarily agreed to, by contract or by consensus, by the disputing parties as an alternative to litigation. A second characteristic of arbitration is that it can be non-binding i.e. advisory only in nature, or the parties may agree that the decision of the arbitrator is final and binding i.e. enforceable by the courts with no appeal to court allowed. A third characteristic of arbitration is that where the parties have agreed to a private arbitration, the mechanism can be advanced by one arbitrator or a panel of arbitrators with powers more flexible than those of a court. Where arbitration is mandated by an insurance policy provision, it may, in fact, facilitate settlement without the parties going to arbitration at all.

Another major feature of arbitration relates to the arbitrator. An arbitrator's qualifications may differ from those of a judge. The arbitrator's powers and jurisdictions also differ from those of a judge. An arbitrator may take a rights-based or interest-based approach to the arbitration, partially driven by his experience and personality. A rights-based arbitrator will look at the dispute as a legal case, focus on the application of relevant legal principles only bearing in mind on a secondary basis the interests of the parties.[85]

In contrast, an interest-based arbitrator will focus on the key concerns of the parties and attempt to resolve them within the legal framework.

☐ Arbitration Agreements

Arbitration statutes exist in all the Canadian provinces as well as at the federal level. In Ontario, the governing legislation is the *Arbitration Act*[86] and sets out the statutory framework for arbitration agreements unless its application is excluded by law. Subject to certain exception e.g. fairness, the parties may agree to contract out of most of the provisions of the Arbitration Act and negotiate their own terms and procedures.[87] Ontario's *Arbitration Act* also governs the enforcement of an arbitrator's award and the parties cannot contract out of the enforceability provision of the legislation. A person who is entitled to enforcement of an arbitration award can apply to court and the courts have the same powers regarding the enforcement of an arbitrator's award as to enforce the court's own judgments.[88]

The parties to an arbitration agreement can agree to have limited discoveries or full discoveries in accordance with the Rules of Civil Procedure. They can also agree to do away with the discovery process. Of critical importance to the arbitration hearing is the admission of evidence including documentary evidence, expert reports, witness statements and transcripts of examinations. In addition, generally speaking, testimony that is hearsay or of arguable relevance may, subject to provisions of the arbitration agreement, be admitted although such evidence will likely receive little recognition in the end result.[89]

The arbitration agreement may provide that the arbitrator's decision is final and binding upon the parties with no right of appeal or it may provide that there may be appeals on the arbitrator's decision only on questions of law or appeals may be allowed on questions of law or mixed law and fact.

Confidentiality of the arbitration proceedings is another matter generally dealt with in the arbitration agreement especially where confidential or potentially embarrassing information will be disclosed during the hearing. It may be agreed that the outcome of the hearing shall be confidential and it may also be agreed that the proceedings be held in camera, closed to the public and the media.

SUMMARY

Creativity has been defined as "any act, idea, or product that changes an existing domain, or that transforms an existing domain into a new one".[90] By calling into play intellectual creativity in the context of ADR practice, the landscape governing the resolution of insurance disputes can become more responsive to party needs and interests and generally more sophisticated.

Insurers are well versed in negotiation theory, strategy and tactics. The insurance company Code of Ethics may serve as an emerging tool to provide additional guidance in negotiations. Assessment of party objectives, the appropriateness of ADR as well as the ADR procedures to the situation will continue to be key considerations in insurance disputes and the predicted outcome.

In three recent decisions,[91] the Supreme Court of Canada has indicated that in determining whether or not an action should proceed as a class action, an example of highly complex litigation, consideration must be given to the existence of compensation schemes i.e. alternative disputes resolution procedures. In *Kanitz v. Rogers Cable*,[92] the Ontario Superior Court of Justice stayed a class action proceeding where the agreement between the parties included an arbitration clause which provided as follows:

> *Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future) arising out of or relating to this Agreement... will be referred to and determined by arbitration (to the exclusion of the courts). You agree to waive any right you may have to commence or participate in any class action against us related to any Claim and, where applicable, you also agree to opt out of class proceedings against us.*

Because of its flexibility, mediation may be adaptable to insurance disputes of all sizes and complexity so as to bring about creative, interactive, and fluid resolutions of disputes. To the extent that insurers are increasingly becoming committed to mediation, the purposes of mediation and the tactics employed should be periodically monitored with a special focus on privacy and confidentiality. Whether a legislative provision, regarding mediator's privilege will come to exist under Canadian law, will be of interest to all stakeholders in insurance disputes.

Special consideration will be required as to the role of the liability insurer in mediations. In appropriate circumstances, where mediation has failed, the parties may also agree to binding arbitra-

tion, which is governed by the rules of natural justice and entails procedural bundle of rights. It is likely that dispute resolution clauses with greater emphasis on confidentiality will increasingly come to be incorporated into various types of insurance policies.

Flexibility implies a corresponding strategy in resolving disputes. Insurance disputes, like other disputes, can be driven by the need for "stability *and* change, order *and* freedom, tradition *and* innovation."[93] These unavoidable conflicting needs can be resolved by court decisions, which may have inherent rigidity, or, where appropriate, by way of alternate dispute resolution mechanisms which may establish a dynamic balance. Alternate dispute resolution mechanisms can motivate people to confront challenges, "by discovering new ways of being and doing", allow disputing parties to transform ideas into settlement options which would otherwise be outside the realm of judicial decisions, bringing about evolution and progress.[94] "Possibilities beget possibilities, they are infinite."[95]

☐ Select bibliography

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☐ Notes

1. L.R. Singer, Settling Disputes: Conflict Resolution in Business, Families and the Legal System 2nd ed. (Boulder: Westview Press, 1994) 76, 167. Insurance companies are also beginning to adopt preventive ADR by inserting dispute resolution clauses in the insurance policy to mandate mediation and other multi-step dispute resolution clauses, about which more is said in this article. See Chapter 6 of A.E. Grant, *Dispute Resolution in the Insurance Industry*: A Practical Guide (Toronto: Canada Law Book, 2000) 14.

2. C.A. Costantino & C.S. Merchant, *Designing Conflict Management Systems*: A Guide to Creating *Productive and Healthy Organizations*, (San Francisco: Jossey-Bass Publishers, 1996) 42. It has been suggested that a key implication of the term ADR is the assumption that the primary and fundamental dispute resolution system is the court-system and alternative secondary methods are regarded with suspicion. See I. R. MacNeil, *American Arbitration Law: Reformation, Nationalization, Internationalization*, (New York: Oxford University Press, 1992) 4.

3. Systems thinking is contextual thinking in the sense that it refers to the understanding of a thing or a phenomenon within the context of a larger whole. See Fritjof Capra, *The Web of Life*, (New York: Anchor Books, 1996) 27, 37.

4. G.A. Chornenki, *The Corporate Counsel Guide to Dispute Resolution*, (Toronto: Canada Law Book, 1999) 7.

5. *Ibid.*, 8.

6. Joseph B. Treaster, "Allstate Said to Coerce Life Agents" *The New York Times*, (May 18, 2002) C1.

7. Robert Verkaik, "Top Judge Attacks Cost of Lawyers" *The Independent* (London), (June 3, 2002) 1.

8. *Ibid.* The British Law Society has advised that it is "committed to alternative dispute resolution such as using mediators rather than lawyers to settle disputes and encourages lawyers to seek fair results to disputes at the earliest opportunity".

9. In Australia, mediation is regarded as part of the movement toward consumer oriented legal services. See Michael Robertson, "Is ADR part of a movement towards consumer-oriented legal services in Australia" (1998) 1 *ADR Bulletin* 1.

10. R.R.O. 1990, Reg. 194 as am. O. Reg. 453/98, 244/01.

11. At the present time, all civil lawsuits in Toronto and Ottawa must go to mediation and civil lawsuits in Windsor will likely be approved shortly as being subject to mandatory mediation. In British Columbia, mediation is mandatory where a party requests it and the action is to be heard in the Supreme Court. Ann Kerr, "Mandatory Mediation Grows in Popularity" *The Globe and Mail*, (June 17, 2002) B10.

12. Le Resche, DN, "Procedural Justice of, by, and for American Ethnic Groups: A Comparison of Interpersonal Conflict Resolution Procedures Used by Korean-Americans and American Community Mediation Centres are Procedural Justice Theories" PhD dissertation, 1990, George Mason University.

13. R.S.O. 1990, c.I.8, s.128.

14. Insurance Act, s. 148, statutory condition 11. Bill 107, *An Act respecting the Agence nationale d'encadrement du secteur financier*, was tabled in the National Assembly on May 8, 2002. It allows the Agency to intervene as a mediator if the parties to a dispute regarding a consumer provision in insurance legislation so agree.

15. A.E. Grant, *Dispute Resolution in the Insurance Industry: A Practical Guide* (Toronto: Canada Law Book, 2000) 14. For an in-depth analysis of ADR choices for insurers including considerations relating to selecting the best process and strategy, see Chapter 1.

16. CPR Institute for Dispute Resolution, "CPR Mediation Procedure" (Rev, 1998) [US/Canada]. Click on "Procedures & Clauses" followed by "ADR Procedures US/Canada".

17. The Law Society of Upper Canada *Short Glossary of Dispute Resolution Terms* (Toronto: Law Society of Upper Canada, 1992).

18. R.M. Kramer & D.M. Messick, *Negotiation as a Social Process*, (Thousand Oaks, Sage Publications, 1995) 217.

19. *Ibid.*

20. R. J. Lewicki, A. Hiam & K.W. Olander, *Think Before You Speak: A Complete Guide to Strategic Negotiation*, (New York: John Wiley & Sons, 1996) 61.

21. *Ibid.*, at 63.

22. *Ibid.*, at 90.

23. *Ibid.*, at 65.

24. W. L. Ury, J.M. Brett & S.B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict*, (San Francisco: Jossey-Bass Publishers, 1988), 6.

25. *Supra*, note 19, at 66.

26. *Supra*, note 14, at 45.

27. W. Ury and R. Fisher, *Getting to Yes: Negotiating Agreement Without Giving In* (Boston: Houghton Mifflin, 1981).

28. *Supra*, note 14, at 46.

29. *Ibid.*, at 46-47.

30. *Ibid.*, at 47.

31. *Supra*, note 19, at 17.

32. *Ibid.*, for an excellent analysis of the application of legal principles to negotiation, see chapter 13.

33. C. Brown, *Insurance Law in Canada*, (Toronto: Carswell, 1997) 240.

34. [1996] O.J. No. 2566 (Ont. Gen. Div.).

35. (1983), 2 C.C.L.I, 227 (Ont. H.C.).

36. *Supra*, note 19, at 226.

37. J.Z. Rubin and B.R. Brown, *The Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975) 15.

38. *Supra*, note 19, at 234.

39. *Supra*, note 17, at 212. The reciprocity norm can also be described as "repay kindness with kindness and evil with justice."

40. The confusing discourse of neutrality or impartiality has also been referred to as "non-partisan fairness". See Chapter 12 in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative*, (Toronto: Emond Montgomery Publications, 1997).

41. R.A.B. Bush & J.P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, (San Francisco: Jossey-Bass Publishers, 1994) 2.

42. C. Noble, L.L. Dizgun, & D.P. Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications, 1998) 1.

43. K.A. Slaikeu, *When Push Comes to Shove: A Practical Guide to Mediating Disputes*, (San Francisco: Jossey-Bass Publishers, 1996) 5, 10.

44. *Supra*, note 23.

45. *Supra*, note 42, at 31.

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47. *Supra*, note 42, at 6.

48. *Ibid.*, at 31.

49. *Ibid.*, at 29 sets out a list of standard interests.

50. *Ibid.*, at 18.

51. B. Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (San Francisco: Jossey-Bass Publishers, 2000) 245.

52. *Supra*, note 39, at 37.

53. *Supra*, note 40, at 16.

54. *Ibid.*, at 7.

55. *Supra*, note 15.

56. Ibid.

57. *Supra*, note 42, at 26.

58. Kylie Burns, *Meddling in the Mediation? Liability Insurers and Mediation*, 10 Australian Dispute Resolution Journal (August, 1999) 216. The article discusses the role of the liability insurer in influencing the model of mediation adopted and the process adopted during the mediation.

59. *Ibid.*

60. *Supra*, note 40, at 20.

61. *Ibid.*

62. *Ibid.*, at 22.

63. J. Folberg & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco: Jossey-Bass Publishers, 1984) 142.

64. *Ibid.*, at 255.

65. J. Macfarlane, ed., *Dispute Resolution: Readings and Case Studies*, (Toronto: Emond Montgomery Publications, 1999) 319 sets out practice guidelines to enhance the effectiveness of the mediation process.

66. In the insurance context, many disputes are automatically sent to mediation at a certain point in the litigation process. In evaluating effectiveness of mediation or any other form of ADR, insurers consider numerous components including the fairness and appropriateness of the criteria to select cases for ADR, how the ADR component ties in with resolution, and whether there is any correlation between the type, size and stage of the dispute and the predicted outcome.

67. *Supra*, note 14 at 67. Under Rule 24.1.14 of Ontario's Rules of Civil Procedure, "all communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions."

68. *Ibid.* at 67.

69. *Supra*, note 64 at 59.

70. *Supra*, note 62 at 265.

71. *Supra*, note 14 at 68.

72. *Supra*, note 62 at 268.

73. *Supra*, note 39 at 333.

74. *Ibid.*

75. *Ibid.*, at 335.

76. *Supra*, note 14 at 73.

77. (1991) 91 A.C.W.S. 3d 728 (Ont. S.C.J.).

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79. *Supra*, note 14 at 67.

80. *Supra*, note 2 regarding *American Arbitration Law* at 10.

81. A multi-step dispute resolution mechanism consisting of negotiation, non-binding resolution and binding resolution is suggested by the CPR Institute. See CPR Institute for Dispute Resolution, Click "Procedures & Clauses", followed by "ADR Clauses – US/Canada", followed by "Abbreviated Clauses for Standard Business Agreements."

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84. *Ibid.*, at Glossary.

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91. *Hollick v. Toronto (City)*, 2001 SCC, 68; *Rumley v. British Columbia*, 2001 69; *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46.

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93. *Supra*, note 3 at 303.

94. *Supra*, note 89 at 110.

95. M.J. Wheatley & M. Kellner-Rogers, *A Simpler Way*, (San Francisco: Berrett-Koehler Publishers, 1996) 13.